HARTECON JV SDN. BHD. & ANOR.

v.

HARTELA CONTRACTORS LTD.

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
VC GEORGE JCA
[CIVIL APPEAL NO: W-04-11-1994]
2 DECEMBER 1995

CIVIL PROCEDURE: *Res judicata - Finality of earlier decision - Whether parties will be allowed to canvass the matter in a future suit or proceeding - Whether principle also applies as between two stages in the same litigation - Whether trial Court or higher Court will allow parties to re-agitate the matter at a subsequent stage of the same proceedings - Whether decision given by Court at one stage on a particular matter is binding on it at a later stage in the same suit or in a subsequent suit*

CIVIL PROCEDURE: *Preliminary objection - On point of procedure - Overruled by Judge - Ruling not perfected yet - Whether Judge has discretion to re-open and reverse earlier ruling - Whether res judicata applies - Whether ruling binding on Court and all parties to the lis until its reversal on appeal*

CIVIL PROCEDURE: *Judgments and orders - Reversal of decision - Whether Judge has jurisdiction to recall an order before it is perfected - Whether it matters if order is final or interlocutory, procedural or substantive*

The parties to the instant appeal had referred the disputes that emanated from several agreements between themselves to arbitration. The appointed arbitrator found for the appellants on liability but declined to assess quantum. Dissatisfied, the appellants made some representations to the arbitrator, in consequence of which, he agreed to adjudicate on the issue of quantum of damages.

Meanwhile, the respondent filed an application in the High Court to set aside the arbitrator's award. The appellants then took out a notice of motion claiming, *inter alia*: (i) a declaration that the arbitrator's award was only an interim award on liability; and (ii) a declaration that the arbitrator had the jurisdiction and authority to do all things necessary to complete the references to arbitration such that a quantified final award might be made. The respondent then took out a notice of motion claiming an injunction to restrain the arbitrator from conducting any further proceedings in the arbitration until further order. At the

hearing, the respondent took a preliminary objection on procedure. The learned Judge overruled the preliminary objection and adjourned the hearing on merits. The respondent's application for an injunction was not heard as the appellants gave an undertaking not to pursue any further proceedings before the arbitrator.

Subsequently, at the hearing of the appellants' motion, the respondent invited the Court to re-open its earlier procedural ruling. After hearing arguments afresh, the learned Judge reversed his earlier ruling, upheld the respondent's preliminary objection, and dismissed the appellants' application. The appellants appealed to the instant Court. Whilst conceding that the learned Judge had the jurisdiction to reverse his earlier procedural ruling as it had not yet been drawn up and perfected, the appellants contended that the learned Judge had exercised his discretion wrongly in the circumstances, and that this would give rise to a multiplicity of proceedings.

Held:

Per Gopal Sri Ram JCA

[1] The learned Judge was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. Although that was a decision made on an interlocutory matter which was purely procedural in nature, it was, nevertheless, binding on the Court and on all parties to the *lis* until its reversal on appeal. Consequently, the decision of the learned Judge in overruling the respondent's preliminary objection had rendered the point taken *res judicata*.

[2] It cannot be over-emphasised that once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly. Certainty and finality are the two pillars on which the judicial process rests.

[3] The principle of *res judicata* is based on the need of giving a finality to judicial decisions; when a matter, whether on a question of fact or law, has been decided between two parties in one suit or proceeding and the decision is final, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* applies also as between two stages in the same litigation to the extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. The parties cannot raise a second time in the same suit

an issue that has already been determined either expressly or by necessary implication. A failure to adhere to these principles may lead to chaos in the conduct of civil proceedings.

[4] If a Judge has the jurisdiction to recall an order before it is perfected, then that jurisdiction is exercisable whether the order is final or interlocutory, procedural or substantive.

[Appeal allowed, appellants' motion restored to the file, and respondent's motion ordered to be heard before appellants' motion.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Res judicata - Kemuktamadan keputusan yang awal - Samada pihak-pihak dibenarkan untuk berusaha bagi mengemukakan perkara itu dalam guaman atau prosiding yang akan datang - Samada prinsip juga terpakai di antara dua peringkat dalam litigasi yang sama - Samada Mahkamah perbicaraan atau Mahkamah yang lebih tinggi akan membenarkan pihak-pihak untuk mendesak semula perkara itu di peringkat yang berikutnya bagi prosiding yang sama - Samada keputusan yang telah diberikan oleh Mahkamah di satu peringkat atas sesuatu perkara yang khusus mengikatnya di satu peringkat yang terkemudian dalam guaman yang sama atau dalam satu guaman yang berikutan*

PROSEDUR SIVIL: *Bantahan awal - Mengenai perkara prosedur - Ditolak oleh Hakim - Keputusan masih belum diperbaiki - Samada Hakim mempunyai budibicara untuk membuka-semula dan mengakaskan keputusan terdahulu - Samada res judicata terpakai - Samada keputusan mengikat Mahkamah dan kesemua pihak kepada lis sehingga pengakasannya atas rayuan*

PROSEDUR SIVIL: *Penghakiman dan perintah - Pengakasan keputusan - Samada Hakim mempunyai bidangkuasa untuk menyemak semula sesuatu perintah sebelum ianya disempurnakan - Samada ianya menjadi sesuatu yang penting jika perintah itu muktamad atau interlokutori, prosedur atau substantif*

Pihak-pihak kepada rayuan di sini telah merujuk pertikaian yang berpunca daripada beberapa perjanjian antara mereka kepada timbangtara. Penimbangtara yang telah dilantik mendapati bagi pihak perayu-perayu atas tanggungan tetapi enggan menaksirkan kuantum. Berasa tidak puashati, perayu-perayu telah membuat beberapa pengemukaan kepada penimbangtara, akibat yang mana, beliau telah bersetuju untuk mengadjudikasikan isu kuantum gantirugi.

Sementara itu, responden telah memfailkan satu permohonan dalam Mahkamah Tinggi untuk mengenepikan award penimbangtara. Perayu-perayu itu kemudiannya mengeluarkan satu notis usul menuntut, antara lain: (i) satu

pengisytiharan bahawa award penimbangtara hanya merupakan satu award interim ke atas tanggungan; dan (ii) satu pengisytiharan bahawa penimbangtara mempunyai bidangkuasa dan autoriti untuk melakukan kesemua perkara-perkara yang perlu untuk menyiapkan rujukan kepada timbangtara hingga satu perhitungan muktamad award boleh dibuat. Responden kemudiannya telah mengeluarkan satu notis usul menuntut supaya satu injunksi bagi menghalang penimbangtara daripada melaksanakan mana-mana prosiding yang selanjutnya dalam timbangtara itu sehingga perintah yang selanjutnya. Di perbicaraan, responden telah melakukan bantahan awal ke atas prosedur. Hakim yang bijaksana telah menolak bantahan awal itu dan telah menangguhkan perbicaraan berdasarkan merit. Permohonan responden untuk satu injunksi telah tidak didengar kerana perayu telah mengakujanji untuk tidak meneruskan apa-apa prosiding yang lain di hadapan penimbangtara.

Berikutan itu, di perbicaraan usul perayu, responden telah menjemput Mahkamah untuk membuka semula keputusan prosedurnya yang lebih awal. Selepas mendengar penghujahan semula, Hakim yang bijaksana telah mengakas keputusannya yang awal, mempertahankan bantahan awal responden dan menolak permohonan perayu. Perayu telah merayu kepada Mahkamah semasa ini. Sementara mengakui bahawa Hakim yang bijaksana mempunyai bidangkuasa untuk mengakas keputusan prosedurnya yang lebih awal kerana ianya masih belum disediakan dan disempurnakan, perayu-perayu menegaskan bahawa Hakim yang bijaksana telah melaksanakan budibicaranya secara salah dalam keadaan itu, dan bahawa perkara ini akan membangkitkan suatu penggandaan prosiding

Diputuskan:

Oleh Gopal Sri Ram HMR

[1] Hakim yang bijaksana telah berhadapan dengan satu bantahan berhubung dengan bentuk prosiding yang telah diterima-pakai oleh perayu-perayu. Beliau telah membuat keputusan bahawa bentuk yang telah dipilih oleh perayu adalah menurut aturan. Walaupun itu merupakan keputusan yang dibuat ke atas satu perkara interlokutori yang mana sesungguhnya bersifat prosedur, ianya, namun begitu, mengikat Mahkamah dan kesemua pihak kepada lis sehingga pengakasannya apabila dirayu. Akibatnya, keputusan Hakim yang bijaksana dalam menolak bantahan awal responden telah menjadikan perkara yang telah dibangkit itu *res judicata.*

[2] Adalah tidak perlu terlalu ditekankan bahawa sebaik sahaja seorang Hakim membuat sesuatu keputusan, samada substantif atau prosedur, muktamad atau interlokutori, ianya mesti dipatuhi dan mungkin tidak akan dibuka semula sewenang-wenangnya. Kepastian dan kemuktamadan merupakan dua tiang di atas mana proses kehakiman terletak.

[3] Prinsip *res judicata* adalah berdasarkan keperluan memberikan kemuktamadan kepada keputusan-keputusan kehakiman; apabila sesuatu perkara, samada berhubung dengan persoalan undang-undang atau fakta, telah diputuskan antara dua pihak dalam satu guaman atau prosiding dan keputusan itu muktamad, tidak satu pihak pun akan dibenarkan dalam guaman atau prosiding yang akan datang antara pihak-pihak yang sama untuk berusaha membangkitkan perkara itu sekali lagi. Prinsip *res judicata* ini juga terpakai antara dua peringkat dalam litigasi yang sama sehingga kepada had bahawa sesebuah Mahkamah, samada Mahkamah perbicaraan atau Mahkamah yang lebih tinggi telah di peringkat yang lebih awal memutuskan sesuatu perkara dengan satu cara tidak akan membenarkan pihak-pihak itu membangkitkan semula perkara itu sekali lagi di satu peringkat yang berikutnya pada prosiding yang sama. Sesuatu keputusan yang diberikan oleh sesebuah Mahkamah di satu peringkat atas sesuatu perkara atau isu yang khusus adalah terikat padanya di peringkat yang kemudian dalam guaman yang sama atau dalam guaman yang berikutnya. Pihak-pihak itu tidak boleh membangkitkannya buat kali yang kedua dalam guaman yang sama sesuatu isu yang telahpun diputuskan lebih awal samada secara nyata atau melalui implikasi yang perlu. Kegagalan untuk mematuhi prinsip-prinsip ini mungkin akan membawa kepada huru-hara dalam menjalankan prosiding sivil.

[4] Jika seseorang Hakim mempunyai bidangkuasa untuk memanggil semula sesuatu perintah sebelum ianya diperbaiki atau disempurnakan, maka itu bidangkuasa itu boleh dilaksanakan tidak kira samada perintah itu muktamad atau interlokutori, prosedur atau substantif.

[Rayuan dibenarkan, usul perayu dipulihkan kepada fail, dan usul responden diperintahkan supaya didengar sebelum usul perayu.]

Cases referred to:

Harrison v. Harrison [1955] 1 Ch. 260 ***(dist)***

Chapman v. Chapman [1954] AC 429 ***(cit)***

Metal Scrap Trade Corporation Ltd. v. Kate Shipping Co. Ltd. [1990] 1 WLR 115 ***(cit)***

Metroinvest Anstalt & Ors. v. Commercial Union Assurance Co. plc. [1985] 2 All ER 318 ***(cit)***

Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman [1995] 4 CLJ 127 ***(cit)***

Sungai Wangi Estate v. Uni [1975] 1 MLJ 136 ***(cit)***

Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers' Union [1995] 2 CLJ 748 ***(cit)***

Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177 ***(cit)***

Supreme General Films Exchange Ltd. v. Singhji AIR [1975] SC 1810 ***(cit)***

Sunkyong International Inc. v. Malaysian Rubber Development Corporation Berhad [1992] 3 CLJ 1531 ***(refd)***

Ting Ling Kiew & Anor. v. Tang Eng Ironworks Co. Ltd. [1992] 3 CLJ 1685 ***(cit)***

Legislation referred to:
Arbitration Act 1952, s. 23
Specific Relief Act 1950, s. 41

Other sources referred to:
English Supreme Court Practice 1993, Vol. 1, para. 42/1/4

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R2-25-18-1993]

For the appellants - Rajendra Navaratnam; M/s. Azman, Davidson & Co.
For the respondent - Lim Chor Pee (Looi Teh Sung with him); M/s. Albar Zulkifli & Yap

JUDGMENT

Gopal Sri Ram JCA:

This appeal concerns certain proceedings consequent upon an arbitration between the appellants and the respondent. The matter arose in this way.

The appellants and the respondent were parties to several agreements each of which contained an arbitration clause. Disputes having arisen between them, the parties agreed to refer these to arbitration. For the purposes of this appeal it is unnecessary to go into the events that preceded the making of the award or the nature of the claims made by the parties against each other. Suffice to say that the arbitrator appointed by the parties, by an award dated 8 December 1992, which he published on 28 December 1992, found for the appellants (plaintiffs in the arbitration) on the issue of liability in respect of some heads of claim but disallowed certain others. However, he declined to assess quantum, taking the view that he was not authorised to do so. So, for all practical purposes, the findings on the issue of liability was an interim award. The appellants were dissatisfied with the arbitrator's refusal to adjudicate on the issue of quantum of damages. They entered into correspondence with him on this matter. We will not re-produce it here. In consequence of representations made to him by the appellants, the arbitrator, on 13 May 1993, wrote conceding that he was mistaken in the view he had taken as to his authority and proceeded to fix dates of hearing to assess quantum.

In the meantime, on 5 February 1993, the respondent filed an application in the High Court to set aside the arbitrator's award of 28 December 1992. On 30 July 1993, the appellants took out a notice of motion in which they claimed the following relief:

(i) A declaration that the award made in the above captioned references to arbitration between the parties and dated 8 December 1992 is an interim award on liability only;

(ii) A declaration that the arbitrator in the above captioned references to arbitration between the parties, Dato' Dr. Peter Mooney, having made and published an Interim Award on liability dated 8 December 1992 has the jurisdiction and authority to do all things necessary to complete the above captioned references to arbitration such that a quantified Final Award may be made and published and is not *functus officio* until the said Final Award is made and published.

Further or alternatively

An Order granting an extension of time to extend the period within which the respondent are required to apply to remit the award published by the arbitrator dated 8 December 1992 pursuant to s. 23 of the Arbitration Act 1952 be extended to the date of filing of this application:

and

An Order that the award made between the parties to the above-mentioned arbitration, dated 8 December 1992 be remitted for amendment to reflect clearly that

(a) the award was an Interim Award on liability only;

and

(b) the arbitrator is seised of jurisdiction to complete the reference to arbitration in respect of the quantum portion.

(iii) An Order that the costs of and incidental to this application be paid by the applicant.

(iv) Further or other relief.

Following this, the respondent, on 23 September 1993, took out a notice of motion in which it claimed an injunction restraining the arbitrator from conducting any further proceedings in the arbitration until further order.

When the appellants' application and that of the respondent claiming injunctive relief came on for hearing on 13 October 1993, Counsel for the respondent took a preliminary objection as to the correctness of the procedure employed by the appellants. The learned Judge, having heard argument on the point, ruled against the respondent and adjourned the hearing on merits to another date. The respondent's application for an injunction was not heard because the appellants gave an undertaking not to pursue any further proceedings before the arbitrator.

When the appellants' motion came to be heard on its merits on 17 August 1994, Counsel for the respondent invited the Court to re-open its earlier procedural ruling. The learned Judge acceded to this request, heard argument

afresh on the point, reversed his earlier decision, upheld the preliminary objection and dismissed the appellants' application. It is against that decision of the learned Judge that the present appeal was brought.

In supporting the appeal, Counsel for the appellants conceded that the learned Judge had jurisdiction to reverse his earlier order because it had not yet been drawn up and perfected. He however argued that the learned Judge had exercised his discretion wrongly in the circumstances of the present case. In support of this submission Counsel cited the decision in *Harrison v. Harrison* [1955] 1 Ch. 260.

In *Harrison (supra),* certain orders were made on the premise that the Judge had jurisdiction to make it. Subsequently, the House of Lords in *Chapman v. Chapman* [1954] AC 429, held that a Judge had no power to make such orders. The orders in *Harrison* had not been perfected and drawn up as at the date on which the House pronounced judgment in Chapman. Roxburgh J who had heard the matter recalled the summonses on which the orders had been made and dismissed them. An appeal against his decision failed, the English Court of Appeal holding that the Judge was entitled to act as he did because the orders had not been perfected.

Counsel argued that this was not a case where the Judge lacked jurisdiction to overrule the preliminary objection. In truth he had ample jurisdiction to do so. He went on to distinguish *Harrison* on the ground that the orders there made were final in nature whereas the present ruling was entirely procedural in nature. We must say at once that we are unable to accept this distinction made by Counsel. If there is jurisdiction to recall an order before it is perfected, then that jurisdiction is exercisable whether the order is final or interlocutory, procedural or substantive.

Counsel's further submission is that the decision of the learned Judge will give rise to a multiplicity of proceedings. He referred us in this behalf to the decision in *Metal Scrap Trade Corporation Ltd. v. Kate Shipping Co. Ltd.* [1990] 1 WLR 115. With respect, that case has little relevance to the present appeal because it concerned an originating summons that claimed a declaration that there was no arbitration agreement between the parties.

The final submission advanced by Counsel was that the procedure adopted by the appellants was not irregular and that in any event it had caused no prejudice to the respondent. In support of this argument we were referred to three authorities, namely, *Metroinvest Anstalt & Ors. v. Commercial Union Assurance Co. plc.* [1985] 2 All ER 318 (an authority which this Court has had the occasion to discuss in *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457), *Sungai Wangi Estate v. Uni* [1975] 1

MLJ 136 which this Court has since overruled in *Syarikat Kenderaan Melayu Kelantan Berhad v. Transport Workers' Union* [1995] 2 MLJ 317, *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 and *Supreme General Films Exchange Ltd. v. Singhji* AIR [1975] SC 1810. The last two cases are authority for the proposition that s. 41 of the Specific Relief Act 1950 is not exhaustive and that declaratory judgments may be granted in situations not covered or envisaged by the section.

In responding to the submissions made on behalf of the appellants, Encik Lim of Counsel for the respondent, argued that it was well within the powers of the learned Judge to alter his judgment at any time before it was entered and perfected. In support of this submission Counsel read to us the following passage appearing under para. 42/1/4 in Vol. 1 the *English Supreme Court Practice, 1993:*

> **Effect of judgment before entry** – A judgment takes effect from the time when the Judge pronounces it, and the subsequent entry of it is a mere form in obedience to the direction of the Court (*Holtby v. Hodgson* [1889] 24 QBD 103). But it is within the powers of a Judge to alter his judgment at any time before it is entered and perfected (*Re St. Nazaire Co.* [1879] 12 Ch. D 88; *Re Suffield and Watts* [1888] 20 QBD 693); and the disclosure to him of a payment into Court does not affect this right (*Millensted v. Grosvenor House Ltd.* [1937] 1 KB 71 CA).

Counsel, in our view, correctly argued that it did not matter whether the order in question was final or interlocutory and that the principle contended for applied to both types of orders. In arguing that the appellants had adopted the wrong procedure in this case, Counsel formulated the following propositions which we set out below:

> (1) An application for a declaration must be made by Originating Summons or writ;
>
> (2) There is no room for a counterclaim in Originating Motion proceedings under the Arbitration Act 1952;
>
> (3) If Parliament has prescribed a specific procedure for obtaining a relief or remedy, then, a party must adopt that procedure in seeking that relief. The Court will not in the exercise of its discretion grant a declaration in such cases. If the application is countenanced, it would have the effect of obtaining a remission of the award.

While we recognise that Counsel on both sides have taken care and pains in advancing interesting arguments covering a wide area of the law relating to declaratory relief, we are spared the task of dealing with the submissions in detail or from examining the authorities cited by them because of the route which we have chosen to arrive at our decision in this appeal.

We take first the complaint that the appellants had chosen the wrong procedure. Were we free to express an opinion on the matter we may well be minded to say, in reliance upon the decision in *Metroinvest Anstalt (supra),* that there is a discretion in a Court whether to permit a proceeding irregularly commenced to be continued or quashed. However, we are in no position to do so because we are required by the doctrine of *stare decisis* to act in obedience to two decisions of the Supreme Court which we read as having concluded the matter in the appellants' favour. They are *Sunkyong International Inc. v. Malaysian Rubber Development Corporation Berhad* [1992] 3 CLJ 1531; [1992] 2 MLJ 146 and *Ting Ling Kiew & Anor. v. Tang Eng Ironworks Co. Ltd.* [1992] 3 CLJ 1685; [1992] 2 MLJ 217.

In *Sunkyong,* there appears the following passage on the effect of O. 2 rr. 1(1) and (2):

> The second point was the failure of the local defendant to state in its affidavit supporting its application for leave to serve out of jurisdiction that in its belief, it had a good cause of action. In our view, this omission could not amount to anything more than a mere failure to comply with a rule of the High Court in regard to form and content of an affidavit, an irregularity curable by costs **without any need for any amendment herein,** *vide* O. 2 rr. 1(1) and (2) of the Rules of the High Court 1980. Costs to be dealt with later would be the only appropriate term to be imposed for allowing the proceeding to remain. (Emphasis added.)

But, as we have earlier said, we choose to decide this appeal on quite a different basis. It is this. The learned Judge, on 13 October 1993, was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. Although that was a decision made on an interlocutory matter which was purely procedural in nature it was nevertheless binding on the Court and on all parties to the *lis* until its reversal on appeal. In our judgment the decision of the learned Judge overruling the respondent's preliminary objection rendered the point taken *res judicata*.

If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of Counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p. 76):

> In *Satyadhyan Ghosel and others v. Sint Deorajin Dobi & Another* AIR [1960] SC 941, the statement of the law on the subject is given thus:
>
> > The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata,* it shall be not adjudged again. Primarily it applies as between past litigation and

> future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.
>
> *The principle of res judicata applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.*
>
> A decision given by a Court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch. D. 182, *Hook v. Administrator-General of Bengal and Others* LR 48 IA 187 and *In the Matter of the Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee and Another* [1936] MLJ 141, 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381). (Emphasis added.)

A failure to adhere to the principle expressed in the judgment of Sharma J just quoted may lead to chaos in the conduct of civil proceedings. The facts of this very case afford a good illustration of such a consequence. We have here an earlier decision by the Judge upon a procedural issue determining it in the appellants' favour. Then along comes the respondent at the adjourned hearing and applies to the Judge to re-open the issue and review his earlier decision. The Judge obliged and reversed himself. What was there to prevent the appellants from proceeding with an application to the Judge to re-review his decision reversing himself? On the assumption of the law made by Counsel before us there would have been no bar to the Judge undertaking such an exercise. The process could then be repeated *ad infinitum* with no conclusion. It would be a circular tail chasing exercise with no forward movement, proving to the man on the street that the maxim "the law is an ass" is not without content. The absurd results that would ensue in accepting the contention of Counsel demonstrates the inaccuracy of the proposition advanced.

We cannot over emphasise the proposition that once a Judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly. One may then ask: how is this approach to be

reconciled with the decision in *Harrison*? The answer to that question lies in recognising that the principle for which that case is authority applies only where it is demonstrated that the Court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

In these circumstances, we are unable to accept the common ground on which Counsel on both sides stood. We therefore had no alternative but to allow the appeal and to restore the appellants' motion to the file.

But that is not the end of the matter because we had to pay heed to Encik Lim's complaint that his application had preceded that of the appellants' and that they should not be permitted to attempt a remission of the award through an unauthorised side entrance. The arguments advanced by Counsel go to the merits of the motion filed by the appellants and must be dealt with at the appropriate stage by the Judge hearing the matter.

Having given this matter our most anxious consideration, we formed the view that the interests of justice will be best served if we direct the Judge who will be assigned this case (the Judge who made the earlier decision being no longer available to hear the matter) to take both applications together but that he shall hear and determine the respondent's motion to set aside the award first and then proceed to hear and determine the appellants' motion.

On the question of costs, we were of the view that the appellants are the authors of the misfortune they complain of. Accordingly we ordered that the appellants are not to have the costs of the appeal and that the deposit paid into Court by them shall be paid out to the respondent as its costs in this Court. The order as to costs made by the High Court was affirmed.

V.C. George JCA:

I have had the benefit of reading the draft judgment of my learned brother Gopal Sri Ram JCA and I concur with it.

Reported by Gan Peng Chiang